

January 8, 1990

MEMORANDUM

TO: Stanley Y. H. Siu, Administrator
Employees' Retirement System
Department of Budget and Finance

ATTN: Karl Kaneshiro, Branch Chief
Enrollment, Claims and Benefits Branch

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Disclosure of Information Regarding the Pension
Benefits of Retired Public Employees

This is in response to a letter dated August 29, 1989, from Robert K. Kekuna, Jr., Deputy Attorney General, requesting an advisory opinion regarding whether under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, information about pension benefits paid to a retired public employee must be disclosed to an agency of another state in response to an administrative subpoena.

ISSUE PRESENTED

Whether the books of account pertaining to pension benefits received by retired public employees must be made available by the State Employees' Retirement System under the UIPA, in response to an administrative subpoena from an agency of another state.

BRIEF ANSWER

Based upon the legislative history of the UIPA and principles of statutory construction, we conclude that detailed information relating to a retired public employee's retirement allowance is not information relating to a former public

employee's "compensation" within the meaning of section 92F-12(a)(14), Hawaii Revised Statutes, and therefore, is not subject to mandatory public inspection.

Further, in determining whether such detailed information concerning a retired public employee's receipt of pension benefits is generally available under section 92F-11(a), Hawaii Revised Statutes, we conclude that disclosure of specific data concerning a retired public employee's pension benefits would constitute a clearly unwarranted invasion of personal privacy, based upon the facts present here. First, the UIPA provides that individuals have a significant privacy interest in information related to their "income," "finances," and "financial activities." Secondly, while there is a significant public interest in the fiscal operation of the Employees' Retirement System ("ERS"), such interest can be furthered by the disclosure of aggregate data concerning the payment of benefits.

Further, the disclosure of a retired public employee's pension benefits would, in the usual case, say little if anything, concerning an agency's performance of its duties or its conduct.

However, based upon facts not present here, such as where specific allegations of fraud are present, the public interest in disclosure may outweigh an individual's privacy interest. In addition, any retirement benefit information that can be calculated based upon "public" information available under the UIPA, such as an employee's minimum and maximum range of benefits, should be disclosed.

Lastly, section 92F-19, Hawaii Revised Statutes, does not permit the disclosure of "confidential" information to agencies of other states, in the absence of a statute or court order permitting or requiring disclosure, or in the absence of circumstances set forth in section 92F-12(b), Hawaii Revised Statutes.

FACTS

The ERS has been served with administrative subpoenas from the State of Washington, Department of Social and Health Services, seeking the production of "all books of account" pertaining to two retired public employees, including the "amount of pension disbursement, date of payments, and balance of pension fund."

The ERS administers the retirement allowances and other retirement benefits received by officers and employees of state and county governments. The general administration and operation of the system is the responsibility of the Board of Trustees for the ERS ("Board"), although administrative control is vested in the Department of Budget and Finance.

The Board has contacted its Deputy Attorney General for advice regarding whether the retirement system must, under the UIPA, permit inspection of government records pertaining to the retirement allowances received by a retired state or county employee, in response to an administrative subpoena from another state.

DISCUSSION

The general rule under the UIPA is that "all government records are open to public access unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). In addition to setting forth this general rule, the Legislature enumerated certain records (or categories of records) in section 92F-12, Hawaii Revised Statutes, which as a matter of public policy, shall be available for public inspection. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). With respect to information relating to present or former employees of an agency, section 92F-12 (a)(14), Hawaii Revised Statutes, provides:

. **92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

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(14) The name, compensation (but only the salary range for employees covered by chapters 76, 77, 297 or 304), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch,

office, section, unit, and island of employment, of present or former officers or employees of the agency, provided that this provision shall not require the creation of a roster of employees; except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency; [Emphasis added.]

Thus, it is necessary to determine at the outset whether a retirement allowance paid to a former officer or employee of an agency is "compensation" within the meaning of section 92F-12(a)(14), Hawaii Revised Statutes. If it is, such information, as a matter of public policy, must be disclosed.

Most authorities discussing the issue have concluded that pensions paid to public employees "are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service." Steinmann v. State of New Jersey, Department of the Treasury, Division of Pensions, 116 N.J. 564, 562 A.2d 791, 795 (1989). See also Linson v. Linson, 1 Haw. App. 272, 276, 618 P.2d 748 (1980) ("retirement benefits are not gratuities flowing from the employer's beneficence, but rather part of the consideration earned by the employee, a form of deferred compensation"), citing In Re Marriage of Brown, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

Despite the fact that we believe that section 92F-12(a), Hawaii Revised Statutes, should be liberally construed (see, e.g., OIP OP. Ltr. 89-14 (Dec. 15, 1989)), the legislative history of the UIPA, principles of statutory construction, and other reasons set forth herein lead us to the conclusion that in using the word "compensation" the Legislature meant "salary."

We find the word "compensation" as used in section 92F-12(a)(14), Hawaii Revised Statutes, to be ambiguous. An ambiguity exists when "there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute." State of Hawaii v. Sylva, 61 Haw. 385, 388, 605 P.2d 496 (1980). On one hand, "compensation" may be broadly defined as any remuneration which results from an individual's employment. See Haw. Rev. Stat. . 77-1 (1985) ("'[c]ompensation' means any salary, wage, fee or other cash emolument paid to an employee for service in a position"). On the other

hand, use of the phrase "salary range" in section 92F-12(a)(14), Hawaii Revised Statutes, creates some doubt as to whether the Legislature intended that compensation include such things as fringe benefits and pension payments.

In drafting the UIPA, the Legislature relied in large part upon the recommendations and findings of the Governor's Committee on Public Records and Privacy.¹ Vol. I Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report") reflects that with respect to compensation paid to public employees, public concern was focused upon the disclosure of "salaries":

If the focus is the salaries of appointed or high level positions, and that appeared to be the case from much of the testimony and comment, then perhaps the formula should allow the specific salaries of most employees to be confidential while providing the information which is more important. For example, providing the actual salaries of all exempt and/or excluded employees would mean that the salaries of all appointed positions and all managerial positions would be public. That could be supplemented by providing the "salary ranges" for all other employees.

Id. at 109.

Against the backdrop of the Governor's Committee Report, significant light is shed on the use of the word "compensation" in section 92F-12(a)(14), Hawaii Revised Statutes, by application of the rule of noscitur a sociis. Under this rule of statutory construction, "the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases." 2A N. Singer, Sutherland Statutory Construction . 47.16, at 161 (Sands 4th ed. rev. 1984). See also State v. Taylor, 49 Haw. 624, 636, 425 P.2d 1014 (1967). Sutherland describes the application of this rule as follows:

[W]hen two or more words are grouped together, and ordinarily have similar meaning, but are not equally

¹ See S. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. S.J. 1093, 1095 (1988).

comprehensive, the general word will be limited and qualified by the special word.

Id. at 161.

Application of this rule of construction to section 92F-12(a)(14), Hawaii Revised Statutes, strongly suggests that in using the word "compensation," the Legislature had "salary" in mind:

[C]ompensation (but only the salary range for employees covered by chapters 76, 77, 297 or 304) . . . of present or former officers or employees of the agency [Emphasis added.]

Of course, the application of a maxim of statutory construction must yield if its application would result in an absurd construction. See Haw. Rev. Stat. . 1-15(3) (1985). Of concern here is whether a public employee's pension benefits could be calculated based upon access to information that is indisputably public, i.e., salary or salary range. If such is the case, the exclusion of pension data from section 92F-12(a)(14), Hawaii Revised Statutes, would be absurd. However, a former public employee's monthly pension benefits are based upon factors other than salary, including but not limited to, that employee's election of a mode of payment under sections 88-83 to 88-98, Hawaii Revised Statutes. Under chapter 88, Hawaii Revised Statutes, a retiree may select one of many payout options, including but not limited to, the receipt of a "lesser retirement allowance" during the retiree's lifetime with the balance being paid to the retiree's beneficiary on death.

Further, it is impossible to calculate a civil service employee's retirement benefits with any accuracy, as under the UIPA only the "salary range" must be disclosed for these employees. Without access to a civil service employee's actual salary, it is impossible to calculate that employee's "average final compensation" that is used as a factor in establishing a retiree's retirement allowance. However, we are informed that it is possible to calculate the minimum and maximum benefits to which a particular retired public employee would be entitled, based upon information that is public under section 92F-12(a)(14), Hawaii Revised Statutes. Of course, in this instance, the ERS must disclose such minimum and maximum benefit

ranges, or the information needed to make the calculations, if contained within a government record. However, the ERS is not required to compile this information if such information does not currently exist, unless it is "readily retrievable." See Haw. Rev. Stat. . 92F-11, (Supp. 1989). In short, no absurdity would result from the construction of section 92F-12(a)(14), Hawaii Revised Statutes, such that a retiree's pension is not encompassed within the term "compensation."

However, having concluded that a retirement allowance or a pension paid to former public employees does not constitute "compensation" within the meaning of section 92F-12(a)(14), Hawaii Revised Statutes, does not end our inquiry. This information must still be disclosed under section 92F-11(a), Hawaii Revised Statutes, unless "access is restricted or closed by law."²

Section 92F-13(1), Hawaii Revised Statutes, provides that an agency is not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Additionally, section 92F-14(a), Hawaii Revised Statutes, states that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Further, in section 92F-14(b), Hawaii Revised Statutes, the Legislature provided examples "of information in which an individual has a significant privacy interest," including:

Information describing an individual's finances,
income, assets, liabilities, net worth, bank balances,
financial history or activities, or credit worthiness.

Haw. Rev. Stat. . 92F-14(b)(6) (Supp. 1989) (emphasis added).

² As the legislative history to section 92F-12, Hawaii Revised Statutes points out, "[t]his list should not be construed as an exhaustive list of the records which will be disclosed . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

Information concerning an employee's pension benefits describes that employee's retirement income and financial activities. Accordingly, the disclosure of information concerning a former public employee's retirement benefits would "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes, unless the retiree's significant privacy interest in this information is outweighed by the public interest in disclosure.

Recent court decisions under the privacy exemption of the federal Freedom of Information Act³ (which also requires the balancing of the individual's privacy against the public interest in disclosure), have established that only a FOIA-based public interest may be considered in applying the privacy balancing test, such that unless disclosure would shed light upon an agency's performance of its duties or would reveal what the government is up to, the "public interest" under FOIA is not advanced by disclosure. See U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. _____, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989); Federal Labor Relations Authority v. U.S. Department of the Treasury, 884 F.2d 1446 (D.C. Cir. 1989).⁴ Significantly, the UIPA does reflect the existence of a significant public interest in the disclosure of how the State's taxpayers' dollars are being spent. See, e.g., Haw. Rev. Stat. . 92F-12(a)(5), (8), (10) and (14) (Supp. 1989).

However, information concerning the calculation of retirement benefits received by former public employees is already described with great particularity by chapter 88, Hawaii Revised Statutes. In addition, the public interest in how the taxpayers' dollars are being spent can equally be served by the disclosure of aggregate data on benefits paid to retired public employees, severed of any information which would identify any particular recipient of such benefits.

³ The legislative history of the UIPA suggests that federal "case law" under the Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

⁴ For a more thorough discussion of these cases, see, OIP Op. Ltr. No. 89-16, (Dec. 27, 1989).

Given the clear directive set forth by the Legislature that individuals have a significant privacy interest in information relating to their "finances," "income," and "financial activities," and given the availability of information concerning the operation of the retirement system from other sources that would equally serve the public interest, we conclude that disclosure of a particular public employee's pension benefit income or payout option selected would "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Specifically, we conclude based upon the facts present here, that the public interest in disclosure of a particular retired public employee's pension is outweighed by that retiree's significant privacy interest in such data, unless the disclosure is otherwise required by law. See Haw. Rev. Stat. . 92F-14(a) (Supp. 1989). However, we do not mean to suggest that such information is entitled to categorical protection. For example, based upon particularized allegations of fraud in the receipt of such benefits, the public interest in disclosure may well outweigh the individual's privacy interest in such data. Those facts, however, are not present here.

Although the plain language of section 92F-13(1), Hawaii Revised Statutes, does not prohibit an agency from disclosing information which would constitute a clearly unwarranted invasion of personal privacy, we strongly recommend against disclosure in the absence of a court order or statute requiring disclosure of such information, given an individual's right to privacy under article I, section 6 of the Constitution of the State of Hawaii.

Lastly, section 92F-19, Hawaii Revised Statutes, establishes the conditions under which an "agency" may disclose government records (other than those records which are "public" under the UIPA) to any other agency.⁵ "Agency" as defined in section 92F-3, Hawaii Revised Statutes, only includes units of government in "this State." Thus, the only provision of section 92F-19, Hawaii Revised Statutes, which may permit inter-state disclosure of government records or information contained therein that is not otherwise public under the UIPA, is section 92F-19(a) (5), Hawaii Revised Statutes, which states:

⁵ See Haw. Rev. Stat. . 92F-19(a) (10) (Supp. 1989) ("otherwise subject to disclosure under this chapter").

(a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

. . . .

(5) To an agency or instrumentality of any government jurisdiction within or under the control of the United States, or to a foreign government if specifically authorized by treaty or statute, for a civil or criminal law enforcement investigation; [Emphasis added.]

It might first appear that section 92F-19(a)(5), Hawaii Revised Statutes, would permit disclosure to an agency of another state as an "instrumentality of any government jurisdiction within or under the control of the United States."

However, the legislative history to section 92E-5(5), Hawaii Revised Statutes, which used language identical to section 92F-19(a)(5), Hawaii Revised Statutes, strongly suggests that the above-quoted subsection permits disclosure of a government record which is not "public" only to federal agencies, or to foreign governments if specifically authorized by treaty or statute, for a civil or criminal law enforcement investigation:

This section delineates guidelines for agencies maintaining records . . . when making disclosures to other agencies. Thus, . . . if the disclosure is to a federal agency, or to a foreign government and authorized by treaty or statute, for law enforcement investigative purposes . . . then such disclosure is permitted.

House Conf. Comm. Rep. No. 46, 10th Leg. 1980 Reg. Sess., Haw. H.J. 1098, 1099 (1980) (emphasis added).

Based upon the sparse legislative history to section 92F-19(a)(5), Hawaii Revised Statutes, we conclude that it only permits disclosure of government records to federal agencies, or agencies under the control of the federal government, not agencies of other states. Accordingly, section 92F-19, Hawaii Revised Statutes, does not permit the ERS to disclose confidential pension data regarding retired public employees to an agency of another state.

CONCLUSION

In construing section 92F-12(a)(14), Hawaii Revised Statutes, based upon the legislative history of the UIPA, and principles of statutory construction, we conclude that in using the word "compensation" the Legislature meant "salary." Accordingly, in the absence of legislative clarification, we do not believe that records relating to a public employee's pension benefits are records which, as a matter of public policy, must be available for public inspection under section 92F-12(a)(14), Hawaii Revised Statutes. However, any information that can be calculated based upon "public" information available under the UIPA, such as an employee's minimum and maximum range of benefits, should be disclosed.

Further, specific information concerning a public employee's pension benefits is the type of information specified by the Legislature in section 92F-14(b)(6), Hawaii Revised Statutes, as data in which an individual has a "significant" privacy interest. In balancing a public employee's privacy interest in such specific information against the public interest in disclosure, we conclude that disclosure would constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Since this information is not otherwise "public" under the UIPA, and since no provision of section 92F-19, Hawaii Revised Statutes, would permit disclosure to an agency of another state, the information sought by the pertinent subpoenas should not be disclosed under the UIPA in the absence of a court order or circumstances set forth in section 92F-12(b), Hawaii Revised Statutes.

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HRJ:sc

cc: Robert K. Kekuna, Jr.
Deputy Attorney General

The Honorable Yukio Takemoto
Director of Budget and Finance

APPROVED:

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